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Supreme Court of the United States

OCTOBER TERM, 1955

No. 579 MISC.

EMIL RECK,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Statement of the Case

1. *Petitioner's mentality.* Petitioner in his brief at pages 14-9 recites at length instances to support a contention that he has been at all times and remains a "borderline mental defective." Yet he admits that he has had "no record of nervous or mental disease." And he further admits that he has had "no peculiarities of conduct, mood, speech or appearance." He also admits that he "spent almost a year in the C.C.C. and the P.W.A. . . ."

Inferentially, the record further shows that petitioner was sufficiently intelligent to be trusted with his part in the lawless scheme cleverly devised by four males on the

threshold of manhood. Three of them, including petitioner, were 19 years of age at the time of the commission of the crime, and the fourth, 17 (Pet. br. 11-2, 18). To the jury which found petitioner guilty it reasonably could have seemed incredible that the other three would have shared their risky ventures with and subjected their future fortunes to the kind of personality petitioner would like this court to conclude he has been and has remained.

The Director of the Behavior Clinic found petitioner neither insane nor feebleminded but of "dull normal intelligence." A jury impaneled prior to the trial found him "not committably feebleminded. . . ." Petitioner admits these facts in his brief.

2. *Petitioner's detention and interrogation.* Petitioner was first arrested and taken into custody at 11:30 A.M. Wednesday, March 25, 1936. He and his three companions were suspected of stealing bicycles (Pet. br. 7) and a saxophone taken in a burglary (Abst. 221; Rec. 909). He was taken to the North avenue police station in Chicago and there asked only one question, namely, whether he knew of any "jobs" pulled by two of his companions (Abst. 31; Rec. 56-7). Approximately at noon or shortly thereafter he was taken to the Shakespeare station where he remained until around 2 P.M. and where no police officers or anyone talked to him (Abst. 32-3; Rec. 62).

At approximately 2:15 P.M. he was returned to the North avenue station where he remained until about 5 P.M. when he was taken to the Warren station (Abst. 37-40; Rec. 89-101). He had had coffee and a ham sandwich at the North avenue station and was given one bologney sandwich at the Warren station (Abst. 40; Rec. 102-3). He was given milk at the Shakespeare station (Abst. 198; Rec. 811-2).

During his afternoon hours at the North avenue station he was questioned concerning numerous thefts and hold-ups he and his companions might have committed, and numerous victims were brought in for the purpose of identifying petitioner and his companions during the afternoon, the following day, Thursday, and until about 7 P.M. Friday (Abst. 94-9; Rec. 288-311). He remained at the Warren station overnight until the following morning sometime, Thursday, and during the whole of that time was not interrogated by anyone (Abst. 40-1; Rec. 100-4).

Thursday morning he was returned to the North avenue station (Abst. 41; Rec. 104) where he was again questioned and where the show-up's continued (Abst. 96; Rec. 297-8). There is no evidence in the record of night-long interrogation the evening of the 26th, Thursday, or the early morning hours of the 27th, Friday, nor any record evidence where or how petitioner spent the night.

Friday the 27th petitioner was again questioned at the North avenue station concerning thefts and again numerous victims were called in and asked to identify him and his

companions (Abst. 96; Rec. 297-8). Early that evening, at approximately 7:20 P.M. (Abst. 66; Rec. 179), he was complaining of constipation (Abst. 67; Rec. 180), had fainted a couple of times (Abst. 69; Rec. 184) and was sent to the county hospital where the examining doctor found nothing wrong with him and refused him, telling the police to take petitioner back (Abst. 69; Rec. 184). At approximately 8:45 P.M., following the first hospital visit, another doctor present at the North avenue station examined petitioner, who was complaining of illness, and found nothing seriously or objectively wrong with him (Abst. 70-1; Rec. 184-6). At approximately 9:30 P.M. petitioner for the *first time* was accused of the Peacock murder, hemorrhaged or vomited blood and was again taken to the county hospital where he spent the entire night, sleeping until approximately 10:30 A.M. Saturday, without interrogation by the police (Abst. 71, 77, 128; Rec. 186, 197, 404-5). Thereafter petitioner was taken, first, to the North avenue station, but thereafter late the same morning (Abst. 129; Rec. 407) or shortly after noon (Abst. 109; Rec. 339) to the State's Attorney's office located in the criminal courts building where later that afternoon a joint confession was taken from petitioner and his companions.

Between 11:00 P.M. and 12:00 midnight Friday photographers were permitted to take pictures of petitioner which appeared in the newspapers (Abst. 59; Rec. 167).

Sunday petitioner saw his father and visited with him. The assistant state's attorney who so testified said he also talked with petitioner's father (Abst. 113; Rec. 351-2) and was corroborated by one police officer (Abst. 132; Rec. 417). On Sunday petitioner signed an individual statement confessing his guilt (Abst. 113; Rec. 350-53) before former members of the grand jury, numerous other witnesses and newspaper photographers (Abst. 55; Rec. 157-8).

Monday the 30th the case went to the Grand Jury and on Tuesday petitioner appeared in court for the first time (Abst. 142; Rec. 469).

3. *Petitioner's illness.* Friday the 27th, during the afternoon, petitioner had not complained of illness (Abst. 134; Rec. 425-6) and apparently first complained of constipation, and fainted, at approximately 7:00 P.M. of that day (Abst. 66, 67, 69; Rec. 179-80, 184). And at that time he was immediately taken to the county hospital where he was examined and refused admission because the examining doctor found nothing wrong with him. The doctor told the police to take the petitioner back (Abst. 69; Rec. 184). Thereafter, at approximately 8:45 P.M. he again complained of illness and was examined by a doctor present at the North avenue station and found not seriously or objectively ill (Abst. 70-1; Rec. 184-6). At approximately 9:30 P.M. of that evening petitioner was for the first time accused of the Peacock murder, hemorrhaged or vomited a relatively small amount of blood and was immediately taken to the

county hospital. He was there medically treated and slept until approximately 10:30 A.M. Saturday (Abst. 71, 77, 128; Rec. 186, 197, 404-5). As late as Sunday the 29th, when the petitioner signed his individual statement in the State's Attorney's office, petitioner was not complaining of illness (Abst. 119; Rec. 370), although petitioner apparently became somewhat ill and vomited at approximately 9:30 or 9:45 that evening (Abst. 80; Rec. 202).

At the time that petitioner hemorrhaged or vomited some blood he told the examining police officer that he had developed an ulcer in the C.C.C. (Abst. 130-2; Rec. 412-5), and was heard by a doctor witnessing his illness (Abst. 46, 70; Rec. 124-5, 185). This was further corroborated by an assistant state's attorney (Abst. 115; Rec. 357).

4. *Petitioner's charges of physical brutality.* Petitioner testified that on March 25, Wednesday, while in the North avenue station during the afternoon, he was hit many times in the jaw and in the stomach by two police officers (Abst. 33-4; Rec. 68-70). Afterward another officer hit him with a blackjack on his feet, back, chest and stomach (Abst. 34; Rec. 71-3). He also testified that he was hit all over the body in this manner at least 20 or 25 times by one officer and innumerable times by another (Abst. 38; Rec. 92-3).

Further he testified that he was twice or more times on Wednesday handcuffed to chairs and then, while handcuffed, raised and suspended on one of the doors of the station (Abst. 35-7; Rec. 75-88). Petitioner testified further that he was treated in this manner—viciously and brutally beaten all about his body and head and face and suspended by manacled hands from doors—during the entire three day period commencing Wednesday and concluding on Friday (Abst. 76; Rec. 196).

Every doctor that examined him on Friday and thereafter testified that they saw no signs or marks of physical brutality (Abst. 58, 61, 65, 69, 70, 119; Rec. 165, 171, 177, 184, 185, 368), and at least six doctors so testified. The various police officers and assistant state's attorneys also so testified without exception (Abst. 108, 134; Rec. 336, 424). Photographs were further taken of the petitioner that Friday night and Saturday afternoon, which appeared in the newspapers, and petitioner was seen by his father and numerous other witnesses, as has already appeared in this brief. Further, all of the police officers, assistant state's attorneys and others variously and individually charged by petitioner as the persons who in some degree beat him altogether denied these charges and testified that none of them at any time physically or otherwise mistreated the petitioner and that none saw others mistreat the petitioner in the presence of the witness (Abst. 94, 129, 134, 220-1, 225-7, 227-32; Rec. 290-1, 406-7, 424, 905-43).

5. *Petitioner's charge that the post-conviction trial judge did not read the transcript of evidence of the original trial on the question of the coerced confession.* Nothing anywhere in the record affirmatively establishes that the trial judge hearing the post-conviction proceeding did not read the original transcript. Petitioner in his brief has not alleged or shown evidence to the contrary.

Petitioner moved orally for a new trial, which was denied, in the post-conviction proceeding (Abst. 144; Rec. 492-3), and none of the grounds of the motion appears in the record. The record further fails to show that at any time during the proceeding did petitioner object that the trial judge was not reading, had not read, would not or should read the original transcript before making his findings and entering his judgment.

ARGUMENT

I.

There is record evidence supporting the findings, verdict and judgment of the original trial, the judgment entered in the post-conviction proceeding and the opinion of the Illinois Supreme Court. Therefore, this court should not and will not weigh that evidence.

The People of the State of Illinois pick no quarrel with and remain adamant in their support of the constitutional principle invoked by petitioner and its applications by this court in a long line of decisions cited by petitioner in his brief at pages 46-7 denouncing state court convictions based on coerced confessions.

But petitioner's febrile attempt to breed the seeds of his contentions in the atmosphere created by the factual circumstances involved in these decisions provides no homeopathic cure for the impotency of his own contentions.

Petitioner cannot establish analogies merely by recounting instances of petitioners hung and re-hung by ropes to trees, severely and continually whipped in the most savage and brutal manner by state authorities (who it must be noted boldly and baldly admitted their uncivilized behavior in open court), as in *Brown* v. *Mississippi*, 297 U. S. 278;

or instances of petitioners interrogated interminably day and night, over a period of a week or two weeks, or throughout the whole of one night virtually without rest and nourishment, as in *Chambers* v. *Florida*, 309 U. S. 227; *Watts* v. *Indiana*, 338 U. S. 49; or instances containing these elements of physical or mental coercion compounded by the insistent, insidious, suggestive and demoralizing wheedling of a psychiatrist with knowledge of hypnosis, as in *Leyra* v. *Denno*, 347 U. S. 556; or compounded by continuous and severe illness and lack of adequate and proper medical care, as in *Wan* v. *United States*, 266 U. S. 1; or compounded by extreme and tender youth, as in *Haley* v. *Ohio*, 332 U. S. 596. Again to be noted, as in the *Brown* case, so in each of these cases, evidence of these facts was undisputed and, in several, even boldly and callously asserted by state authorities.

But several elements identified in each of these decisions —the mere questioning of a suspect while in the custody of police officers—have not by this court been held, without substantially more, sufficient to constitute a want of common law or due process of law. *Lisenba* v. *California*, 314 U. S. 219, 239-41; cf. also *Wan* v. *United States*, 266 U. S. 1, 14.

Reiterating its position in *Lyons* v. *Oklahoma*, 322 U. S. 596, 601, this court also said (602-3):

> "* * * *But where there is a dispute as to whether the acts which are charged to be coercive actually occurred, or where different inferences may fairly be drawn from admitted facts,* the trial judge and the jury are not only in a better position to appraise the truth or falsity of the

defendant's assertions from the demeanor of the witnesses but the legal duty is upon them to make the decision. *Lisenba* v. *California, supra,* p. 238.

"Review here deals with circumstances which require examination into the possibility as to whether the judge and jury in the trial court could reasonably conclude that the McAlester confession was voluntary. The fact that there is evidence which would justify a contrary conclusion is immaterial. To triers of fact is left the determination of the truth or error of the testimony of prisoner and official alike. * * *" (Emphasis supplied.)

Again reaffirming its position in *Stein* v. *New York,* 346 U. S. 156, 184-5, this court stated that "the detention and interrogation of a suspect as under the circumstances appears reasonable is not coercive," adding that it does not function as a "super-jury." *Ibid.* 180. This court has therefore properly adopted the position that its function is not to set aside a state court conviction on the ground that its underlying verdict is against the weight of the evidence.

Consistent with its position is this court's relatively recent denial of *certiorari,* 347 U. S. 956, and rehearing, *id.* 979, in *Palakiko* v. *Harper,* C. A. 9th Cir., 209 F. 2d 75, 84, 90-3, in which the court of appeals rejected one defendant's contention of "psychological coercion" where the record showed that the question was raised upon conflicting evidence sufficient to support the jury's verdict, even though the jury in its verdict may have been in error.

Admittedly the evidence in the record of the case at bar is highly conflicting, as found by the Supreme Court of Illinois. (Pet. br. 72.) But there is in this record evidence

supporting petitioner's conviction, the denial of the writ in his post-conviction hearing and its affirmance by the Illinois Supreme Court. Under these circumstances, this court should not reweigh that evidence and disturb the findings of two courts and a jury and their review by the highest court of this state.

II.

There is a complete absence of evidence in the record showing that the post-conviction trial judge did not read the original transcript on the question of the coerced confession. Therefore, the post-conviction trial judge cannot be presumed to have acted improperly.

Petitioner filed no written motion for a new trial and the record fails to show what grounds, if any, supported his motion. Accordingly, he cannot now urge error in this court.

Irrespective of the post-conviction trial judge's conduct and petitioner's failure regarding his motion for a new trial, the evidence in the record sustains the findings and judgment of the post-conviction trial judge and the findings and judgment of the original trial. Petitioner has therefore failed to show prejudice.

Petitioner while quoting a statement of the post-conviction trial judge, to-wit: "Well, I haven't seen the transcript yet," sets forth no evidence in his brief—and there is none in the record—affirmatively showing that the trial judge failed to read the original transcript in evidence upon

the post-conviction trial. Therefore, this court cannot and should not presume that the trial judge conducted the proceeding improperly and in violation of any constitutional prohibition.

Petitioner filed no motion for a new trial in writing and the record fails to disclose what grounds, if any, he urged in support of that motion which was denied by the trial judge. Moreover, at no time during the course of the post-conviction proceeding, before, at or after the original transcript in question had been admitted in evidence, did petitioner object to the course of the proceeding on the ground that the trial judge was not reading and had not read the original transcript. Accordingly, having invited error, if any, petitioner cannot now complain of an alleged violation of his constitutional rights predicated upon that error.

The evidence in the record, highly conflicting and virtually irreconcilable, nevertheless supports together with all reasonable inferences that might be drawn therefrom by the trial judge in the post-conviction proceeding, and by the jury and judge at the original trial, the findings and judgments that have been entered in these proceedings. Where the evidence sustains the findings and judgments attacked, this court should not disturb those findings and judgments. Petitioner has failed to show prejudice.

CONCLUSION.

For these reasons, petitioner has failed to show that the instant case is one in which this court should issue its discretionary writ of *certiorari*.

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